



Generally Speaking

Comings and Goings

Welcome to new AAG **Diane Foster**, who joined the Child Protection Section.

Congratulations to **Kamie Willis** on her promotion to Litigation Assistant for the Labor and State Affairs, and Opinions, Appeals and Ethics Sections.

The RAPA section welcomes **Kristi Duff** to the section. She was recently hired as LOA to replace **Karyl Richards**, who has joined the Legal Support Services section as the Administrative Assistant.

The Fairbanks DAO welcomed ADA **Leslie English** to the misdemeanor unit this month. The office lost LOA **Cori Randall** who relocated to Wyoming. The section is sorry to see Cori leave, and are very happy to welcome Leslie.

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AAG **Wayne Cary** has given notice he will be leaving the Nome Child Protection Section office effective March 1, 2007.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in OCS petitions:

Airport police reported that childrenages three and eight were playing unsupervised and traveling with an intoxicated woman. Upon investigation, the woman was identified as the mother of the children. She had a BAC of .239. The mother and children had been living in Texas, but were on their way back to a remote village in Alaska. The children's father was working in Texas. OCS assumed emergency custody of the children and attempted to locate family members to care for the children while the mother resolved her substance abuse issues.

A mother gave birth to a child in the home of a registered sex offender. It was reported the two adults used cocaine and then the mother went into labor. The man attempted to deliver the child for 90 minutes without calling for assistance. The mother and child needed medical care and were finally transported to the hospital. Both mother and child tested positive for cocaine and the mother and the father of the child have significant criminal histories. OCS took custody of the infant.

OCS took custody of five children after getting a report that the eldest child went to school hungry, sleepy, unkempt and hoarded food. The child said her uncles urinated in the rooms of the house, and passed out and vomited outside the bathroom in the middle of the night. The OCS social worker investigated and found a filthy home with few items appropriate for children visible. At a later time, law enforcement went to the home and

described the environment as “vile.” In addition, the father’s probation officer did a random drug test, which came back positive for cocaine. The mother also admitted to using cocaine. The children were placed with their grandmother. OCS had received numerous reports on this family, dating back to 1997.

In September, OCS took custody of three children due to their parents’ substance abuse and abandonment of the children. A fourth child in the family was living with his grandparents. The grandmother came to Anchorage with the children so they could all live with the children’s mother. Unfortunately, the mother assaulted the grandmother after the mother returned to the home in an intoxicated state. The grandmother decided to return to her village, so OCS took custody of the fourth child.

OCS had received 11 protective service reports involving a mother and her children, mostly having to do with substance abuse and domestic violence related neglect. Most recently, the mother went to the DHSS office in which OCS and DJJ are both housed in order to talk to her son’s probation officer. The probation officer had the opinion that the mother was using methamphetamine and was coming down from her high. Police and OCS went to the mother’s home and she would not allow entry for 30 minutes. Police officers were also of the opinion that the mother was high on methamphetamine. The mother refused to provide a urinalysis sample. OCS removed her children from her care and placed them with a relative.

A 5-year-old made a call stating she could not wake her mother. She also stated she had not been to school that day, and she was supervising her 18-month-old brother. When the social worker went to the home, the 5-year-old answered the door. The mother was sound asleep. When the mother awoke she said she was sick. The school reported the 5-year-old had missed 25 days already this year. On another home visit, the social worker found the mother lying on a chair, asleep. Her friend

attempted to wake her for 30 minutes, but she was unresponsive. When the mother finally woke up, the social worker asked her to take a drug test, but she refused. The mother became angry and told the social worker to take the children and said she was leaving. OCS assumed emergency custody of the children. The 5-year-old requested a sleeping pill from her foster mother, stating her mother gave them to her. OCS had received 14 previous reports of concern on this family.

Success Story

OCS just released custody of three children back to their mother. A four-day contested adjudication had been held in May 2005, at which the court found that the mother had seriously physically abused her step-daughter and then fled the state with her own girls when OCS attempted to take custody. The mother eventually returned prior to the adjudication hearing. Although the parties to the case thought it was headed toward termination of parental rights, the adjudication trial ended up being a wake-up call to the mother. For the past 1 ½ years, she worked hard to become a better parent and has gotten her life back on track. At a hearing to get Judge Tan’s approval for the release of custody, all parties and the court were very complimentary about the progress the mother had made. It’s good to be able to report a success story. AAG Beth Russo handled this case.

Litigation

Tanana v. State. The state is currently defending *Tanana et. al. v. State* in the Anchorage Superior Court where other Alaska Native villages are seeking a declaration that they have the inherent authority to initiate child protection cases. Briefing has now been completed. AAG Dan Branch participated in oral argument on December 1 before Judge Sen Tan.

Other Activities

AAG Jan Rutherford continues to participate in a workgroup formed by the Rural Justice Commission. The mission of this workgroup is to recommend language for a model MOU between federal, state and tribal entities concerning the disposition of ICWA cases in the State of Alaska. Jan has been participating in weekly teleconferences in order to have a draft MOU available by December. The draft has already been completed, but the Commission has given the subcommittee permission to continue to work on a more polished document.

AAG Gayle Garrigues recently provided training at the "Specialized Legal Issues in Child Welfare" class through the School of Social Work Training Academy at the University of Alaska. The organizers appreciated Gayle's participation in the two day training aimed at providing information and practical tips to help child protection workers understand the court process in Child in Need of Aid cases. The organizers said Gayle "provided helpful and specific information that added to the training on preparing for court, writing court reports, and practice giving testimony". Gayle provided a wealth of experience, and her direct and mentoring style was beneficial to the trainees.

Anchorage, Palmer, and Kenai AAGs attended an Educational Conference sponsored by the Casey Foundation aimed at educating professionals in the child protection field on the importance of ensuring that foster children are appropriately educated. Too often children in foster care change schools and drop out of school as a result of being in foster care. Participants committed to doing what each of us can, within the parameters of our specialties, to help alleviate this problem.

Commercial and Fair Business

Consumer Protection/Anti-Trust

State Settles Investigation With Lithia. The section settled a year-long investigation of Lithia Auto Dealers in Alaska that will require Lithia to pay

\$500,000 in civil penalties, plus restitution to all affected consumers. The investigation focused on two selling practices that are illegal under Alaska law: (1) Lithia's practice of charging document preparation fees or "doc fees" in addition to the advertised price of new and used cars; and (2) Lithia's failure to provide disclosures relating to the accident and repair history of used cars. Consumers who paid a doc fee will get a refund of the fee. Consumers harmed by not receiving disclosures will have an opportunity to recover damages in a streamlined arbitration procedure. AAG Ed Sniffen headed up this investigation and negotiated the settlement with Lithia.

Consumer Protection Settlements Involving "Live" Check Solicitations. On behalf of the state, the section entered into two multi-state settlements relating to the use of "live" check solicitations. In the first case, Alaska, along with 15 other states, reached a settlement with Chase Bank and Trilegiant Corp. resolving allegations that Trilegiant, through a partnership with Chase and other businesses, solicited consumers with offers of "free" trial membership programs without informing consumers their Chase credit cards, Chase mortgage accounts, or bank accounts would be billed or charged if the "free" trial was not cancelled in a specific amount of time.

Trilegiant sent the solicitations in mailings with the Chase Bank or other business partners' logo, and usually included a check for \$2 - \$10. By cashing the checks, the consumer purportedly agreed to pay for the membership program after the trial period ended, and consumers were automatically billed by Trilegiant on a monthly or yearly basis after the trial period ended. Under the settlement Trilegiant and Chase agreed to reform their business practices, provide consumer restitution and pay a total of \$14.5 million to the States.

In the second case, Alaska, along with 34 other states, reached a settlement with YP Corp and its subsidiary, Telco Billing, Inc. d/b/a YP.com, resolving allegations the company deceived consumers by automatically signing them up for its

online yellow pages. According to the settling states, the company sent businesses and other organizations “live” activation checks for approximately \$3.50. On the back of the checks, in fine print above the endorsement line, the company placed language stating that, by endorsing the check the recipient agreed to purchase online advertising and to be billed for the services. Under the agreement, YP Corp will cease using the checks to obligate businesses to purchase its products and services. YP Corp also agreed to pay \$2 million in restitution and investigatory costs.

AAG Julia Coster represented Alaska in these two multi-state matters and, in the YP Corp matter, she was the lead attorney for the multi-state group.

Department of Revenue, Division of Gaming

In re Alaska Native Brotherhood Camp 2 the Alaska Native Brotherhood Camp 2 applied to the Department of Revenue for leave to use an electronic system to conduct their bingo games. The department denied their request because games played using the electronic system do not meet the definition of “bingo” provided by the charitable gaming statutes. December 12, 2006 an Office of Administrative Hearings Officer issued a Decision and Order on Summary Adjudication affirming the department’s rejection of the system. AAGs Mike Barnhill and Dan Branch represented the department in the case.

Alaska Post-Secondary Education Commission (ACPE)

ACPE settled an adversary proceeding filed in the Bankruptcy Court against the State of Alaska in which plaintiff Hunt requested that all of his student loans be discharged. Hunt filed the adversary proceeding requesting his student loans (both state and federal) be considered discharged because payment of these debts would be an undue hardship for him. Hunt owed ACPE in excess of \$60,000 and had never made a voluntary payment to ACPE on his debt. Both

ACPE and the federal lender filed motions for summary judgment arguing that he did not qualify for an undue hardship discharge because he could not meet all the prongs of the Brunner test. After oral argument before Judge Ross, the judge suggested the parties see if a settlement of some kind could be reached. After several proposals by both sides, a settlement has been reached wherein Hunt will be required to pay a portion of his debt to both lenders over a long period of time. AAG Mary Ellen Beardsley represents ACPE in this matter.

Alaska Housing Finance Corporation (AHFC)

Wells Fargo has agreed to reimburse AHFC for the full amount of a check which Wells Fargo negotiated without having the signatures of all parties named on the check, one of which was AHFC’s loan servicer. In March of 2004, water damage occurred to real property owned by James Cooper upon which AHFC holds the deed of trust. Mr. Cooper apparently made an insurance claim and Allstate, the insurer, paid him over \$27,000 in August of 2004. At no time did Cooper, AHFC’s borrower ever tell Alaska USA FCU (the servicer of the loan for AHFC) damage had occurred and that a claim had been made. The check issued by Allstate was made out to both Cooper and Alaska USA FCU. Cooper took the check to Wells Fargo Bank and deposited it in his account without first obtaining the signature of Alaska USA.

Cooper used the funds for everything but repairs to the property. It was not until October of 2005 that Alaska USA learned of the check and in November 2005 it obtained a copy of the cancelled check which showed it had never been endorsed by Alaska USA. After much wrangling between Allstate, Northrim Bank (the issuing bank) and Wells Fargo Bank, a demand was submitted in February 2006 to Wells Fargo Bank by the servicer requesting payment of the entire amount of the check. Wells Fargo advised it would take at least 6 months for a decision to be made on the demand. After Wells Fargo continued to stall, AHFC requested the AG’s

office to get involved. In September Wells Fargo offers to pay \$5,000. In November, AAG Mary Ellen Beardsley on behalf of AHFC sent a formal demand letter to Wells Fargo requesting payment and threatening a lawsuit if the bank refused to pay. Just after Thanksgiving Wells Fargo agreed to pay the full amount and the check was finally received by Alaska USA in late December.

Division of Investments

The Alaska Division of Investments (ADI) had a judgment in excess of \$195,000 that was paid in full after this office domesticated the judgment in Hawaii. In 2005, ADI obtained the judgment against the Duncans. The Duncans reside in Hawaii and AAG Beardsley domesticated the judgment in that state and recorded the judgment against any real property owned by the Duncans.

In 2006 a law firm in Hawaii was hired to attempt to collect the judgment. The firm obtained a title report on the Duncans' real property and it turned out a lender had given them a significant loan but only after ADI's judgment was recorded. Demand was made upon the lender to pay off the state's judgment since the state was in first position. The lender made a claim on the title insurance company who issued the title insurance. The title company has now paid off the remaining portion of the state's judgment, including the attorney's fees for the Hawaii attorney, and the state has assigned the judgment to the title company.

Division of Corporations, Business and Professional Licensing

Decisions

In the Matter of Gary Gerlay. On December 1, Superior Court Judge Peter Michalski approved former Anchorage physician Gary Gerlay's voluntary dismissal of his appeal of the State Medical Board's ("Board's") summary suspension of his medical license. The Board originally suspended Gerlay's license on April 21, 2005 based on an ex parte motion filed by the Division of

Corporations, Business and Professional Licensing ("Division"), finding that Gerlay was a clear and immediate danger to public health and safety under AS 08.64.331(c). The Board, following an evidentiary hearing, adopted the hearing officer's proposed decision on August 10, 2005, and continued the summary suspension of Gerlay's license until a final resolution of the disciplinary matter. Specifically, the hearing officer found the Division had established Gerlay had improper sexual relationships with two female patients, committed sexual improprieties with a third patient, allowed an unlicensed employee to provide patient care, failed to meet the minimum standards for controlled substances prescribing, and refused to submit to a Board ordered evaluation.

Gerlay appealed the summary suspension decision to the superior court on August 22, 2005. On September 14, 2005, Judge Michalski denied Gerlay's motion to treat the appellate file as "confidential" or "under seal". On April 5, 2006, he denied Gerlay's motion to have the state pay a portion of the cost of the hearing transcript, finding Gerlay had not demonstrated insufficient assets or an inability to pay for the record. After missing several deadlines to do so (and surviving a motion to dismiss based on lack of prosecution), Gerlay finally arranged to have the record on appeal filed on August 24, 2006.

Despite obtaining several extensions, Gerlay never filed an opening brief. Back on the administrative level, the division and Gerlay have stipulated that, based on the record from the summary suspension hearing, the hearing officer can prepare a proposed final decision, including recommended disciplinary sanctions, without the need for an additional evidentiary hearing. Gerlay's license remains suspended. AAG Robert Auth has represented the Division during the hearing process and the Board during the superior court appeal.

In the Matter of Sergey Artemenko a.k.a. Greg Art. On December 13 the Commissioner of the Department of Commerce, Community and Economic Development, through the Division of Corporations, Business and Professional Licensing

("Division"), and pursuant to AS 08.01.087(b)(1), issued a temporary cease and desist order against Sergey Artemenko a.k.a. Greg Art because he was practicing acupuncture without a license (in violation of AS 08.06.010), as well as practicing naturopathy without a license (in violation of AS 08.45.010). A November 21, 2006 Anchorage Daily News article described Mr. Art's skills as an acupuncturist, which also included photographs. The article also described Mr. Art as a homeopath, which the division determined to be part of the practice of naturopathy. If a hearing is timely requested, the temporary order may be affirmed, modified or reversed through the hearing process; if no hearing is requested, the order becomes final 15 days after service. AAG Robert Auth is representing the Division in this matter.

Environmental

Cruise Ship Air Opacity Standard Compliance.

Reported opacity violations for emissions from cruise ships continue to remain low for vessels in Southeast Alaska following the cruise industry's wide-spread switch to higher quality fuels in 2001-2002. DEC regulators continue to communicate with the cruise industry about efforts to improve self-monitoring activities. AAG Ruth Hamilton Heese assists DEC staff in compliance and enforcement matters. In 2006, DEC collected a standard civil penalty of \$27,500 for one Notice of Violation in 2005.

Premier Industries. Premier Industries agreed to a compliance order by consent with the Department of Environmental Conservation to settle a dispute over air quality permitting requirements for Premier's Ship Creek foam insulation extrusion facility. Under the terms of the COBC, Premier agreed to apply for a Title V air quality control operating permit and to pay penalties of \$67,294 with \$20,188 suspended. Premier will also pay costs incurred by DEC and the Department of Law to investigate the alleged violations and to negotiate the COBC. AAG Steve Mulder assisted DEC in the matter.

Human Services

Litigation Update

Despite the state prevailing on the first TRO request in the *Baker* matter, counsel for the plaintiffs filed a second TRO, which has been fully briefed. They also sought reconsideration of the court's order denying the first TRO. Oral argument on the second TRO is scheduled for January 22, 2007.

Section Chief Stacie Kraly is in active negotiations with the Northern Justice Project to resolve the pending Medicaid cases. She also continues to be inundated with Certificate of Need litigation.

Other cases are also active. AAG Kraly filed a response to a petition for review in *Banner Health v. Karleen Jackson*. In the *Fairbanks Ambulatory Surgical Center Appeal*, she participated in a number of depositions, and responded to written discovery. That matter is scheduled for a four-day hearing in Fairbanks at the end of January 2007. AAG Kraly is also in active discovery in the *Imaging Associates of Providence Appeal* and is working on another appeal related to the determination of what constitutes a physicians office versus an independent diagnostic testing facility.

AAG Nevhiz Calik has taken over all of the "fair hearings" in Anchorage and won her first contested matter. She has also filed appeals to the superior court in two administrative appeals.

Medicaid

Subrogation/Liens

During the month of December the subrogation "team" (AAG Tim Twomey, paralegal Kathey Virgin, and LOA Shelby King) collected \$133,523.12. They expect payment of an additional \$85,000.00 for matters that have been resolved. The team has an active caseload of 627. The total collected during calendar year 2006 is \$1,821,859.66 (a monthly average of

\$151,821.64). During calendar year 2005 the total collected was \$1,022,577.93. The 2006 results show more than a 56% increase as compared with 2005.

Audits

AAG Rebecca Polizzotto now has 10 Medicaid Audit administrative appeals. The records have been filed and briefing will be in January. AAG Polizzotto was successful in front of Judge Bolger on a motion filed by opposing counsel for an evidentiary hearing on appeal.

Other Matters

Over the past month the Human Services Section has welcomed AAG Robin Fowler of the Fairbanks AG office to help on Medicaid matters. AAG Fowler has taken on all of the Quality Assurance matters, which will aid the agency in this growing area. In addition, AAG Fowler successfully resolved a contentious matter last month, thereby avoiding an administrative appeal.

Labor and State Affairs

Education

Moore v. Department of Education and Early Development (DEED). The trial concluded this month when team members (Neil Slotnick, Kathleen Strasbaugh, Anne Johnson, Dean Guaneli, and Terri Begley-Allen) filed proposed findings and conclusions of law for the court's consideration, and team leader AAG Neil Slotnick made the closing argument on December 19.

On December 14 AAG Kathleen Strasbaugh filed an amicus curiae brief for DEED to support the state of New Mexico in the U.S. Supreme Court case of *Zuni Public School Dist. v. Department of Education* on an issue of federal education funding. The issue concerns the impact aid that the federal government provides to states affected by the presence of federal activity (for example, a military installation). Alaska has an equalized system of education funding in which the state

takes into account disparities in districts' access to local funds. The state wants to continue to take federal impact funds into account when providing funds to the school districts because otherwise the impact funds will undermine the equalized funding system.

Employment

Cahill v. State. AAGs Brenda Page and Richard Postma concluded a wrongful termination bench trial on December 14 in this case brought by a former social worker claiming constructive discharge.

General Services – Contracts

Government Computer Sales v. State of Alaska, Division of General Services. On October 19, 2006, Judge Burbank, pro tempore, issued a decision and order in this 601 appeal, affirming the decision of the Commissioner of Administration on a contract claim filed by the division. The division claimed that a supplier of computers added fictional shipping charges to each computer ordered and that these charges violated the contract, resulting in an overcharge over the term of the contract of \$228,935. The court agreed and awarded damages to the division in the amount sought of \$228,935. GCS filed a motion for reconsideration on October 27, 2006. AAG Margie Vandor represented the state.

Investment Fraud

This month the state settled an investment fraud case against Time Warner/AOL, and collected almost \$50 million on behalf of the Alaska Permanent Fund and public employee pension funds, which lost money when stock investments in the companies dropped in value. The state claimed that the firms had misrepresented advertising revenue and the number of AOL subscribers to boost profits and stock prices. The state settled for \$50 million on its original \$70 million claim. Working with outside counsel, AAG Mike Barnhill represented the state.

Medicaid Rates

Valley Hospital v. State. On December 15 AAG Susan Daniels argued an appeal in superior court from a decision of the commissioner of health and social services that Valley Hospital had failed to file on time its notice of appeal from the 2003 Medicaid rates.

Retirement and Benefits

State v. Alaska Civil Liberties Union. On December 19 the Alaska Supreme Court granted the state's petition for review. The state had asked the Court to review a superior court order to the commissioner of administration to revise and expand the regulations that the commissioner had adopted to implement the Supreme Court's order to provide employment-related benefits to the same-sex partners of public employees and of members of state retirement systems. The Court reversed the superior court's order, concluding that a review of the constitutionality of the details of the benefits scheme while the state was adopting it would interfere with the primary goal of providing the benefits expeditiously. It also upheld the state's position that the commissioner had sufficient authority to adopt the regulations, and it deemed the regulations effective. AAG Gina Ragle represented the state, assisted by AAGs Joanne Grace, Dave Jones, and Jan DeYoung.

Workers' Compensation

Veco v. State. On December 13, AAG Richard Postma argued this case before the Alaska Supreme Court. The employer had asked the second injury fund to reimburse it for the workers' compensation benefits paid to an employee who became injured on the job because the employer knew of a preexisting medical disability at the time of hire. However AS 23.30.205(c) requires written notice of the impairment and the employer lacked written notice of a disabling condition before the work injury.

Legislation Regulations

During December, the Legislation and Regulations Section spent an active month reviewing legislation for the 2007 regular session of the Alaska State Legislature.

Regulations projects reviewed in the section included: (1) Department of Commerce, Community, and Economic Development (insurance rate and application fees); (2) Board of Veterinary Examiners (examination for licensure); (3) Board of Pharmacy (licensing, change of pharmacy location, other miscellaneous matters); (4) Board of Fisheries (corrections to reorganization of sport fishing regulations for Southeastern Alaska Area); (5) Department of Fish and Game (hunting seasons and bag limits for geese; reissue and transfer of permits for active duty military); (6) Department of Education and Early Development (special education intensive services); and (7) Department of Transportation and Public Facilities (commercial vehicles on public highways and measurement standard).

The section also prepared several revisor's memorandum to make technical changes in the regulations. This section also prepared for publishing the Alaska Industrial Development and Export Authority's regulations on curtailment of originator or financial institution eligibility.

Natural Resources

Norval H. Nelson, Sr. v. State, CFEC, and Norval E. Nelson, Jr. v. State, CFEC. On December 18 AAG John Baker received favorable superior court decisions in two related appeals from denials of limited entry permits, *Norval H. Nelson, Sr. v. State, CFEC*, and *Norval H. Nelson, Jr. v. State, CFEC*. In both cases Judge Michael Wolverton found that a claim for "extraordinary circumstances" points was controlled by *Cleaver v. State, CFEC*; that substantial evidence supported the CFEC's conclusion the Nelsons had failed to prove mis-advice by CFEC staff about licensing requirements; and that the

Nelsons had waived any challenge to the optimum number for the fishery under *Simpson v. State*. Further appeals to the Alaska Supreme Court are expected.

Controversial Board of Fisheries Meeting

Completed. AAG Steven Daugherty attended a lengthy meeting of the Alaska Board of Fisheries in Dillingham and provided legal advice on issues related to Board regulatory proposals. The Board considered 125 regulatory proposals and 154 people signed up for oral testimony before the Board. The Board made a number of regulatory changes but tabled controversial issues for further Board committee work. The tabled issues included a possible recommendation to the legislature on formation of a fisheries reserve in Bristol Bay drainages, gear stacking proposals for holders of two permits, and proposals for changes to vessel length limitations in the Bristol Bay salmon drift gillnet fishery.

Motion to Dismiss Granted in *Vanek v. State*.

On December 1 Anchorage Superior Court Judge Sen K. Tan granted the state's motion to dismiss in *Stephen Vanek et. al. v. State, Board of Fisheries*, 3AN-05-12647 CI, a class action filed by Arthur Robinson. The Plaintiffs alleged that regulations of the Alaska Board of Fisheries resulted in an impermissible taking of the access value of their CFEC limited entry permits and shore fishery leases in Cook Inlet. Judge Tan dismissed the case for failure to state a claim for which relief could be granted. Judge Tan held that the plaintiffs lack a cognizable property interest in the use of their permits, and that while shore fishery leases grant an interest in land, that interest cannot be taken by Board regulations under the conditions of the leases. AAG Steven Daugherty represented the state in this matter.

Federal Subsistence Board

AAG Mike Sewright attended the Federal Subsistence Board meeting held on December 12-13 in Anchorage. Among other things, the Board considered a proposed rule to change the rural/nonrural status of several Alaska

communities. Prudhoe Bay, Point MacKenzie, and areas near Homer, Sterling and Ketchikan were changed from rural to nonrural. Adak changed from nonrural to rural, and Kodiak retained its rural status.

Board of Agriculture and Conservation Board

On December 14, AAG Tina Otto attended the Board of Agriculture and Conservation Board meeting. The meeting was rescheduled from November and allowed Tina to meet many of the Division of Agriculture employees she will be advising.

Big Game Commercial Services Board

From December 11-13, Senior AAG Kevin Saxby attended the Big Game Commercial Services Board meeting in Anchorage. The Board considered, and eventually adopted, a series of proposed changes to regulations governing hunting guides and transporters, as well as testing procedures and licensing standards. The Board is still rebuilding its comprehensive regulatory and licensing oversight, following its abolition almost a decade ago, and reinstatement in 2005.

Opinions, Appeals and Ethics

The section reports AAG Judy Bockmon has completely reviewed and updated the ethics training and educational materials. She also sent a new procedures guide for boards and commissions for posting on the ethics web page. The section considered and granted one request for a conflict waiver this month.

On December 27 AAGs Dave Jones and Judy Bockmon gave a briefing to new commissioners and other members of Governor Palin's team on their obligations under the Executive Branch Ethics Act and the Public Records Act.

Appeals/Litigation

Prentzel v. State, Department of Public Safety.

AAG Mary Lundquist argued this case before the

Alaska Supreme Court. Mr. Prentzel sued the state under § 1983, claiming damages for false arrest. The troopers arrested Mr. Prentzel for violation of conditions of release because he had a bottle of whiskey in his pocket and APSIN (as confirmed by Fairbanks Correctional Center records) provided that Mr. Prentzel was not supposed to possess alcohol as a condition of his release on a recent DWI arrest. As it turned out, Mr. Prentzel was no longer under a condition of release because he had pled out, and the statutes did not (at that time) allow arrests for violations of conditions of release on a DWI. The case primarily raised issues of qualified immunity.

C.N. v. State. The Alaska Supreme Court rejected a challenge to the Office of Children's Services' (OCS) pilot implementation of the Team Decision Making program, a program developed by the Annie E. Casey Foundation. The program provides that before OCS changes the placement of a child in state custody, a meeting is held at which parents, foster parents, other relatives, social workers, guardians ad litem, and other persons with a stake in the child's welfare provide input and share ideas with the OCS social worker who ultimately is responsible for determining the child's placement. Participation by all participants except the social worker is voluntary. Under the former system, the social worker unilaterally made placement decisions without any formal process to obtain input from interested persons. A parent's attorney challenged the Team Decision Making process, arguing that due process required the mandatory presence of parents' attorneys at any such meetings.

The superior court rejected the challenge, and the attorney petitioned the supreme court for review. The state opposed the petition, arguing that voluntary participation in team decision making meetings is constitutionally permissible because such meetings are not required by law and are not judicial proceedings, and because judicial review of decisions made after such meetings is readily available to aggrieved parties. The state also argued this particular challenge was not ripe,

as both parents' attorneys actually attended the meeting, which resulted in a decision that favored the parents. The supreme court rejected the parent's petition without comment. AAG Mike Hotchkin represented the state.

B.P. v. State, OCS. AAG Mike Hotchkin filed the state's appellee brief in this termination of parental rights appeal. OCS had three of this Kodiak couple's four children in state custody for several years (the youngest child, who was born while the older children were in state custody, remained in the home for two years while OCS worked to replace the older children in the home) before returning them to the couple and closing the child protection case. A few months later the mother, who has a history of mental difficulties, physically abused two of the children, and OCS took all four children into state custody.

An expert retained by the state to evaluate the family concluded that during the course of OCS's involvement all services available in Kodiak had been exhausted and the children could not withstand another attempt at reunification. The state then petitioned to terminate the parents' parental rights. The trial court granted the petition and both parents appealed, although the mother's appeal was dismissed after her attorney was unable to locate or communicate with her. Termination of the father's rights was based on neglect, due to his absences from the home and his failure to protect the children from their mother.

The father argued that the state failed to show that he caused any harm to the children, that OCS did not make reasonable efforts to address whatever shortcomings he had, and that even if termination of his parental rights was appropriate, the trial court erred in concluding that it had no jurisdiction to order post-termination visitation. The father's position is interesting in that the bulk of his argument is directed only at the youngest child, whose first removal from the home had come after the mother abused two of the older children. A decision is expected in mid-to-late 2007.

Regulatory Affairs & Public Advocacy (RAPA)

Hearing

U-06-10, Fairbanks Natural Gas/Enstar. RAPA participated in an adjudicatory hearing on December 6 conducted by the Regulatory Commission of Alaska (RCA). RAPA, Enstar, DOD, and Fairbanks Natural Gas (FNG) pre-filed the testimony of their respective witnesses. RAPA's expert witness, staff economist Cristina Klein, addressed the question of FNG's current exemption from economic regulation. FNG serves gas customers in the Fairbanks area with gas supply from the Cook Inlet but was required to negotiate a special contract for gas supply with Enstar due to the failure of its regular supplier (Aurora Gas) to continue supply after October 1, 2006. AAG Steve DeVries is the litigating attorney for RAPA. The parties await the RCA dispositions regarding the special contract and FNG's deregulated status.

Stipulated Settlement

U-06-06, ML&P Depreciation. ML&P filed a depreciation study with the RCA based on its electric plant balances as of December 31, 2004. After conduct of discovery, analysis and preparation of pre-filed testimony, RAPA and ML&P reached a settlement regarding all issues in the proceeding resulting in an outcome very close to RAPA's advocacy position. The effect of the stipulated depreciation rates is to reduce ML&P's total depreciation by approximately \$2 million. Sam Cason is RAPA's attorney of record in the case. The settlement was filed with the RCA for approval on December 1.

New Cases

U-06-134, Chugach Electric Association (CEA) Rate Case. CEA filed a tariff revision request with the RCA that would result in an approximate \$3.5 million revenue reduction from retail electric customers (in Anchorage) and an approximate \$6.3 million revenue increase from electric

wholesale customers (in the Matanuska Valley, Homer and Seward). RAPA has contracted with Larkin & Associates to provide comprehensive analysis of the utility filing and make recommendations regarding the appropriate revenue requirement and related rate design. A hearing is scheduled for August 2007.

U-06-128, Interior Telephone & U-06-130, Mukluk Telephone. GCI requested interconnection with Interior Telephone and Mukluk Telephone to enable GCI to provide competitive local telecommunications services in the respective service areas of these two incumbent local telephone service providers. This request triggers an inquiry (which must be adjudicated within 90 days) into the termination of the respective rural exemptions of Interior and Mukluk under applicable federal telecommunications law. The hearing is scheduled for February 21, 2007.

Public Advocate Advisory

An advisory was issued on December 11 by Acting Attorney General Craig Tillery to inform Alaska long distance telephone customers of their eligibility to claim a telephone tax refund on their 2006 federal tax return. A result of federal court decisions, the refund is a one-time payment designed to refund previously collected excise taxes assessed on long-distance telephone usage.

RAPA Section Chief Daniel Patrick O'Tierney wrote that individual taxpayers can claim a standard refund amount (between \$30 to \$60 depending upon the number of exemptions claimed), or can determine their refund amount by figuring the actual amount of tax paid if they review their phone bills for the period between February 28, 2003 and August 1, 2006. It is estimated that a total of \$10 billion will be refunded to individuals.

Intervention Summary Update

As of December 15, RAPA is involved in twenty dockets before the RCA. That number includes eighteen adjudicatory matters in which the Attorney

General has elected to participate as a party and two rulemaking proceedings in which RAPA has participated in workshops and hearings. RAPA also monitors related matters before the RCA, the FCC, and the Legislature, and provides policy analysis to the Attorney General, and through the Attorney General to the Governor's office, as requested.

Torts & Workers' Compensation

Supreme Court Rules on Two Petitions for Review

State of Alaska, Department of Corrections v. Cowles. The state petitioned for review of the superior court's denial of the state's motion for summary judgment based upon discretionary function immunity. The underlying lawsuit was brought by the personal representative of a spouse and child murdered by a parolee; plaintiffs sued the Department of Corrections for negligent parole supervision. In the petition for review the state urged the Court to overrule its prior *Division of Corrections v. Neakok* case which rejected immunity for supervising parolees and for formulating a parole plan. Although the Court declined to entirely overrule its decision in *Division of Corrections v. Neakok*, the Court overruled that portion of *Neakok* which held that the formulation of a parole plan, and the selection of special parole conditions are not planning activities entitled to immunity.

The Court also held that the Court will examine, on an individual basis, whether specific actions taken or not taken, are immune (involving discretion) or operational (actions which are required by a predetermined policy so no discretion involved) and therefore subject to tort liability. A plaintiff may only rely on non-immune acts to establish causation. The case is remanded to the trial court for inquiry into the nature of the decisions made, and whether they are entitled to immunity or whether the plaintiff may go forward with certain claims.

C.J. v. State of Alaska, Department of Corrections. The state similarly petitioned for

review of the superior court's denial of the state's motion for summary judgment based upon discretionary function immunity. Plaintiff cross-petitioned on issues involving the non-economic damages caps in AS 09.17.010. The underlying lawsuit involved a victim of sexual assault's allegations that a parolee was negligently supervised. The Court reiterated its analysis in the *Cowles* decision issued on the same date regarding discretionary function immunity.

On plaintiff's cross-petition, the Court held that the non-economic damages caps imposed by AS 09.17.010 do not violate the equal protection clause of the Alaska Constitution. (Justices Bryner and Carpeneti dissenting). The Court further held that each sexual penetration constituted a separate "incident" for purposes of AS 09.17.010. (The statute provides that "[m]ultiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section.").

Transportation

Knik Arm Bridge and Toll Authority Issues

Request for Qualifications. The Knik Arm Bridge and Toll Authority issued a request for qualifications (RFQ) seeking firms or consortiums interested in privately financing, constructing and operating a toll bridge over Knik Arm. The Authority will evaluate the qualifications of respondents in order to create a short list of parties capable of privately developing a toll facility. Parties on the short list will provide input on feasible mechanisms to privately finance a bridge and ultimately be eligible to respond to a request for proposals to develop a bridge. Section Chief Jim Cantor assisted the Authority.

Favorable Decision in Driveway Appeal. DOTPF decided a new commercial driveway should be routed to open onto a side road rather than directly onto a main road. Following a hearing on appeal, an administrative hearing officer upheld DOTPF's decision. AAG Gary Gantz represented DOTPF.

Engineering Firm Dismisses Appeal. DOTPF determined an engineering firm's response to a request for proposal was not responsive because the name on the firm's response did not match the name on any Alaska business license. Apparently the firm had changed its name, but not updated its business license. Although the firm appealed DOTPF's decision, the award of the contract to a different firm was not stayed. After some delay, the firm ultimately dismissed its appeal. AAG Geoffry Wildridge represented DOTPF.

Electric Company Dismisses Appeal. An electric company applied for a permit to install a line in a highway right of way. DOTPF denied the permit request and the electric company appealed. Prior to a hearing, the electric company provided more information about the design of its proposed line and the two parties resolved their differences. AAG Peter Putzier represented DOTPF.

CRIMINAL DIVISION

Anchorage DAO

New Charges

Group charged in gang-related home invasion on New Year's Day, January 1, 2006. On November 28, 2006, the Anchorage Police Department charged six men in connection with the New Year's Day home invasion robbery of an Anchorage home by 30 to 40 young people chanting the gang name, "Fam Bam" The young people beat and kicked the four occupants of the home. There had been a party of young people at the home earlier and the four occupants had told the group to leave. They did, but they talked about it after they left, decided they had been insulted, returned, kicked in the door and beat the occupants.

Indictments

On November 29, 2006, the grand jury indicted Victor Cabrera of Unalaska for murder in the

second degree and assault in the first degree for driving while intoxicated, running from police, and rolling his van, killing one passenger and seriously injuring a second passenger.

On December 1 Dante Leal was indicted by the grand jury for sexual abuse of a minor in the first and second degree committed between 1996 and 2003 against two of his daughters.

Sentencings

Keith Landers sentenced to 109 years in murder of his wife. On December 1, , Judge Philip Volland sentenced Keith Landers to 99 years in jail for the murder of his wife and ten years consecutive for attempted murder in the first degree for shooting at her friend. The composite sentence was 109 years in jail.

On November 19, 2004, Landers, age 72, killed his wife of some 29 years by shooting her in the back of the head. As of November 19, Rose Evangeline Landers was living in the family home in Eagle River. The Landers were in the process of getting a divorce in court and a division of personal property had been agreed on. The two had boxed the personal property for Keith Landers to pick up. They were at the Landers home that morning, when Keith Landers arrived to pick up the property. When he got there, he complained that, by his wife's boxing the property, he could not tell whether the division was in accordance with the agreement. Because Rose Evangeline Landers and Jorene Hout had plans to run errands and did not want to argue, they decided to leave Keith Landers at the house to make whatever corrections he chose.

After the two women left, Keith Landers himself left the house and went to his own house in Anchorage. There, he armed himself with two handguns and then returned to the Eagle River home. When Rose Evangeline Landers and Jorene Hout returned, Keith Landers went to the basement where he dropped some dishes piled there. Suspecting he was deliberately destroying

dishes, Rose Evangeline Landers and Jorene Hout went down into the basement. When they got down into the basement, he broke some more dishes. The two women started back up the stairs.

As the women went up the stairs, Keith Landers grabbed Jorene Hout, pulled her back down the stairs, pointed a gun at her, and fired a shot. She ducked, just as he fired at her. She said she could feel the bullet going by her head. He then went up the stairs after his wife. Upstairs, he shot her in the back of the head and killed her.

Landers then went next door to a neighbor's house and told them he had just shot his wife. He also said he had planned to shoot himself, but did not have the courage to do it.

At trial in July, 2006, Keith Landers, now 74-years-old, moved around the courtroom like a decrepit old man. The jury did not give in to the sympathy factor, however, but instead voted to return a guilty verdict of murder in the first degree as to Rose Evangeline Landers and attempted murder in the first degree as to Jorene Hout. It took them about three hours to find Landers guilty after a twelve day trial. ADA Sharon Illsley won the trial and appeared for the state at sentencing.

Jack Morrell sentenced to 50 years for the second degree murder of man in Taco Bell drive-up line. On December 7, Judge Eric Aarseth sentenced Jack Morrell to 60 years in jail, with 10 suspended, for second degree murder. In a second case, he imposed an additional year for bootlegging.

On February 27, 2004, Jack Morrell had been in line at the drive-up window of the Taco Bell on East Fifth Avenue in Anchorage when, intoxicated, he bumped into the vehicle ahead. The driver whose vehicle he struck, Eric Kalenka, got out to talk to Morrell. Talking in a loud and excited voice, Kalenka berated Morrell for hitting his vehicle. Morrell got out of his vehicle, followed

Kalenka back to his car and grabbed him. A struggle ensued. The struggle moved to the front of both cars, where the two men fell to the ground.

During the struggle on the ground, Morrell used a knife to stab Kalenka seven to eight times. One stab wound was in the leg and cut a principal artery or vein. A third driver pulled Morrell off Kalenka. Kalenka went back to his car, where he sat in a growing pool of blood until police and paramedics arrived. He was pronounced dead at the hospital. ADA Adrienne Bachman handled the trial, which took place between June 20 and July 10, 2006, and the sentencing. ADA Dan Shorey had tried Morrell in the bootlegging case.

Trials

Timothy Leedy convicted of felony DUI at trial.

On April 8, 2006 at about 5:17 p.m. Officer Katie Paakki of the University of Anchorage Police Department observed a tan Honda turn North on to Lake Otis from the wrong lane. Officer Paakki stopped the Honda and contacted the driver, Timothy Leedy, who smelled of alcohol. The officer saw an open case of Coors Light beer in the back seat, but Leedy said he had not had anything to drink. Officer Paakki administered field sobriety tests, which Leedy failed. Leedy had a breath test result of .192 blood alcohol; but the result was suppressed, because the officer insisted that he blow into the Datamaster before he called his lawyer. Leedy had prior convictions for DUI in Anchorage in 2000 and 2001. On December 4, the jury returned a guilty verdict against Leedy, who was represented by Pam Dale. ADA Alison Collins won the conviction in this trial presided over by District Judge Jack Smith, sitting as a superior court judge.

Thomas Leichty and Patrick Shorty convicted of sexual assault in the first degree. On July 8, 2003, Thomas Leichty and Patrick Shorty, along with an accomplice never identified, met a woman downtown near the Bus Accommodation Center. They started walking and talking together. The woman believed they were heading in the

direction of a bus stop along her intended route and went along with the men. One of the men suggested that the group take a short-cut through a field. In a treed area, the men grabbed her, pushed her to the ground and sexually assaulted her. When she yelled for help, they hit her in the face.

Leichty held her down as Shorty raped her and Shorty held her down as Leichty raped her. The third man said something about a cop, and the three men ran off. An Anchorage police officer was nearby and the victim pointed out two men running away, telling the officer that they had attacked her. The officer caught Leichty.

The DNA evidence was strong. Swabs from the victim's clothing and body contained Shorty's DNA. Swabs from Leichty's clothing and body had not the victim's, but Shorty's DNA on them! Both men were convicted of sexual assault in the first degree. Shorty, who fought with police when they tried to arrest him, was also convicted of providing a false name to police, resisting arrest, and misdemeanor assault on a police officer. ADA Erin White tried the case for the state before Superior Court Judge Michael Wolverton.

[Fairbanks DAO](#)

The busy trial calendar that started in November continued in December. ADA Matt Christian in the misdemeanor unit did two trials a week until the week of December 25. His trial ordeal also included a trip to Tok for a felony DUI trial involving operation of a river boat. The felony unit was similarly busy with several trials.

With the return of the Stryker Force, the office has seen an increase in domestic assaults. The office continues to see a constant number of misdemeanor and felony DUI's. December also saw the indictment of two individuals who committed a number of commercial burglaries during the August to October time frame.

On December 19, Elizabeth Steele was sentenced to eight years with four years suspended for the robbery of the Alaska USA Credit Union on December 20, 2005. She received a mitigated sentence based on the court's finding that the robbery was committed to provide necessities for her family. Ms. Steele was linked to the robbery when she paid \$2,000 in back rent to avoid being evicted. The landlord became suspicious after hearing of the robbery on the news. The landlord contacted the Alaska State Troopers who then contacted the bank at which the landlord deposited the rent money. The bank still had the deposit isolated and the money was identified as being taken in the robbery.

[Kenai DAO](#)

As an update to the murder trial concerning the son who killed his mother by stabbing her in the back, the jury convicted him of murder in the second degree. He said he did it because she hated him; he was one of five children of a single mother who worked really hard to give all of her children a good life. Three of them came to court and testified against their brother.

The grand jury was kept busy this month with an assortment of drug and alcohol-related cases, including burglaries, MICS cases, and domestic violence. They indicted six multiple-count burglary/theft cases, eight domestic violence assaults, five felony DUIs, and five felony drug cases.

One Homer case made headlines when the defendant, purported to be with the Russian mafia, hired some guys and together all four kidnapped and pistol whipped the victim. They made him sign a confession that was smeared with blood. As a result of the beating, the victim lost at least five teeth, and had his nose broken and eye sockets caved in. The defendant said the victim torched his Lexus.

The very notorious Evans Austin of "the limit" of the same name is back with yet another domestic

violence assault. Unfortunately he is very good historically at picking victims who recant before the cuffs are even in place.

A Kenai Alaska State Trooper was very lucky. He went to the aid of a woman who was reported to be suicidal. She talked him into following her into her house, and then ran to a couch, pulled out a gun, and fired it point blank at him. Fortunately for him she didn't know how to load the gun properly and it didn't fire. The trooper managed to apprehend her without mishap.

Kodiak DAO

A 19-year-old California miscreant "visiting" his in-laws in Kodiak quickly wore out his welcome. After two weeks of lying around the house and doing nothing but watching The Gang Channel on TV, he was told it was time to get a job or to return to California. In reaction to this sage direction, this defendant rather immediately menaced the grandfather of his child with a bread knife. After being indicted for three counts of felony fear assault in the third degree, he plead to three counts of misdemeanor assault, receiving three parallel and consecutive sentences of 360 days with 330 suspended.

He was placed on probation for 10 years with conditions that include he consume no alcohol, not enter any bar or liquor store, not wear any gang-identifying clothing, and observe a 9:00 pm to 7:00 am curfew for the next twelve months. At his sentencing this defendant expressed his clear intention to immediately return to the great State of California upon his release from jail.

Another 24-year-old Kodiak man, upon observing his wife talking with another man in a bar, went outside the bar and slashed all four tires on her car. After his wife took a cab home, he immediately returned home and upon arriving threatened her with a knife. Even though she demonstrated all the physical manifestations of fright when the officers responded to the 919 call, and verbally expressed that she had been afraid

she was going to die, within 72 hours this victim was sending letters to every state official from the governor on down claiming it had all been a misunderstanding, and that any fear expressed was purely the product of her intoxication and that her husband (a "very sweet man") in fact had never acted menacingly toward her.

Facing the prospect of a trial on felony assault, this defendant pled to assault in the fourth degree, criminal mischief in the fourth degree, and resisting arrest (all class A misdemeanors) and received a composite sentence of 720 days with 660 suspended. In addition, he was placed on probation for five years, ordered to undergo a substance abuse evaluation and to complete any treatment as required, and ordered to complete an anger management course or counseling. During the term of his probation he is to neither possess nor consume any alcohol, nor to be found in any bar or liquor store, and is not to engage in any assaultive behavior.

Nome/Kotzebue DAO

In December, SART Training was held in Nome. Thank you to AAG Teresa Foster, Katy Tepas (Program Coordinator, Dept. of Public Safety) and Tara Henry (nurse), among others, who put on the presentation. The training was well attended by interested people from this region and by others from around the state, including Jason Weiner from the Fairbanks DAO.

December also saw an interruption in a brisk retail drug business operated by Tammy Stevens out of her mobile home in Kotzebue. Complaints of drug dealing and heavy foot traffic prompted police to stake out her trailer. Sure enough, within thirty minutes police counted over a dozen "visitors" stopping by. One of these "visitors," when asked by police a block or so away, disclosed that he had just purchased marijuana from Stevens.

Police obtained a search warrant for the trailer and inside found cocaine and a purple Crown Royal bag stuffed with marijuana packaged for

resale. Stevens denied having any more drugs. Nevertheless, four more bindles of cocaine were produced from her bra at the jail. Stevens was indicted on several drug felonies with trial set for March.

Thomas Soolook, on misdemeanor probation barring consumption of alcohol, was found sitting out front of the Nome District Attorneys Office highly intoxicated—his breath alcohol a whopping .355. This was Soolook's fifth such violation of probation, and the t-shirt he wore summed up his performance on conditions. It read, "Lead Me Not To Temptation--I'll find it myself."

Palmer DAO

Judge Beverly Cutler sentenced Christopher A. Kevan to 198 years and 80 days in prison for the murders of his girlfriend, Brandie Burns, and his seven-week-old son, Ashton Burns. The prosecutor was ADA Richard Payne.

Robert Hale, a/k/a "Papa Pilgrim," pled no contest to a consolidated count of sexual assault in the first degree, a consolidated count of incest and a consolidated count of coercion. As part of the resolution, Hale agreed to serve 14 years in prison. Prosecutors were ADAs Richard Payne and Rachel Gernat.

Joe Jorgenson and Alvin Severance III pled no contest to misconduct involving a controlled substance in the second degree for possessing seven ounces of heroin with the intent to deliver. As part of their agreement with the state, each will be serving five years, with additional suspended time open to the judge. ADA Suzanne Powell handled this case for the state.

A Palmer jury convicted James Harpster of criminal mischief in the fourth degree and criminal mischief in the fifth degree. In the last two years, Harpster pumped four to five million gallons of water onto his neighbor's property to prevent flooding in his home, which was built on a low

spot about two feet above the water table. The Prosecutor was ADA Michael Perry.

Adrian Barr was sentenced to two years, with 18 months suspended, and placed on probation for five years for using a knife to threaten a Palmer police officer who responded to an incident of domestic violence.

Richard Horton pled no contest to sexual abuse of a minor in the first degree. ADA Rachel Gernat handled this case.

Justin Pflugh was indicted on charges of first, second and third degree assault for breaking a five-month-old baby's ribs. ADA Suzanne Powell prosecuted the case for the state.

Christopher Irick was indicted on charges of robbery in the first degree and assault in the third degree. Irick walked into Chimo Guns with a handgun, pointed it at the owner's head and took money. Investigators from the Wasilla Police Department developed Irick as the suspect, and he was arrested in Anchorage by an Anchorage police officer. DA Roman Kalytiak prosecuted the case.

Daniel Stephan was convicted, after a jury trial, of felony DUI, felony refusal and eluding a peace officer in the second degree. ADA Michael Walsh tried the case.

Thirty-nine people were indicted on new felony charges by the Palmer grand juries in December.